

**United States Circuit Court of Appeals
For the Ninth Circuit.**

MENASHA WOODEN WARE COM-
PANY, a Corporation,
Plaintiff in Error.

vs.

SOUTHERN OREGON COMPANY, a
corporation, COOS COUNTY; RO-
BERT R. WATSON, County Clerk of
Coos County; A. JOHNSON, Jr., Sher-
riff of Coos County, and T. M. DIM-
MICK, Treasurer of Coos County,
Oregon; and FLANAGAN & BEN-
NETT BANK, a corporation,
Defendants in Error.

BRIEF ON BEHALF OF DEFENDANT
IN ERROR, FLANAGAN & BENNETT
BANK

Upon Writ of Error

To the District Court of the United States
For the District of Oregon

DOLPH, MALLORY, SIMON & GEAR-
IN,

Attorneys for Plaintiff in Error.

TEAL, MINOR & WINFREE,

Attorneys for Flanagan & Bennett
Bank.

L. A. LILJEQVIST,

Attorney for Coos County, et al.

**United States Circuit Court of Appeals
For the Ninth Circuit.**

MENASHA WOODEN WARE COM-
PANY, a Corporation,
Plaintiff in Error.

vs.

SOUTHERN OREGON COMPANY, a
corporation, COOS COUNTY; ROB-
ERT R. WATSON, County Clerk of
Coos County; A. JOHNSON, Jr., Sher-
iff of Coos County, and T. M. DIM-
MICK, Treasurer of Coos County,
Oregon; and FLANAGAN & BEN-
NETT BANK, a corporation,
Defendants in Error.

BRIEF ON BEHALF OF DEFENDANT
IN ERROR, FLANAGAN & BENNETT
BANK

Upon Writ of Error

To the District Court of the United States
For the District of Oregon

DOLPH, MALLORY, SIMON & GEAR-
IN,

Attorneys for Plaintiff in Error.

TEAL, MINOR & WINFREE,

Attorneys for Flanagan & Bennett
Bank.

L. A. LILJEQVIST,

Attorney for Coos County, et al.

STATEMENT

This litigation began with a bill of complaint filed by the United States against the Southern Oregon Company to forfeit the title to certain lands, part of which are situated in Coos County, Oregon. In that bill of complaint it was alleged that the title to all of said lands appeared of record to be in the Southern Oregon Company. This suit was pending in the United States Courts on the second day of July, 1912, and is still pending in said Courts and undetermined, the Southern Oregon Company having appealed to the Circuit Court of Appeals.

On the second day of July, 1912, Southern Oregon Company claiming to own certain of these lands situated in Coos County, Oregon, filed its bill of complaint in the Circuit Court of the State of Oregon for Coos County in which it alleged that the sheriff and tax collector of Coos County was about to advertise and sell said lands for delinquent taxes, and prayed for an injunction.

On the third day of July, 1912, the Circuit Court for Coos County, Oregon, then having jurisdiction over the parties and the subject-matter of the said suit, upon the ex parte application of the

Southern Oregon Company entered an order restraining the sheriff and tax collector as prayed for in said suit. The same order provided for the payment to the clerk of said Court by the plaintiff of the amount of money shown by the tax rolls of Coos County, Oregon, to be due from the plaintiff as taxes upon the lands assessed to the Southern Oregon Company and that the money so paid should be held until the final determination of the suit first above mentioned, then pending in the Circuit Court of the United States for the District of Oregon. In pursuance of this order but not until March 15, 1913, Southern Oregon Company drew its check upon the Flanagan & Bennett Bank for the sum then due from the Southern Oregon Company as taxes upon the lands assessed to the Southern Oregon Company as shown by the tax rolls of Coos County, Oregon. This check was delivered to the clerk of said State Circuit Court and afterward on July 5, 1913, was endorsed by said clerk to the County Treasurer of Coos County, Oregon, and on the same day was presented for payment to the Flanagan & Bennett Bank and the same was duly paid.

Between March, 1913, and July, 1913,

the Act of the Legislative Assembly of the State of Oregon (Laws of 1913, chapter 273, page 515) went into effect. Section 5 of this Act provides that it shall be the duty of all public officers excepting clerks of school districts, having and holding in their possession or custody public funds or money in trust for any person by virtue of their office, or any money held in custodia legis to as soon as practicable pay the same over to the County Treasurer * * * and that all moneys so paid over to the County Treasurer as aforesaid shall be paid out by the County Treasurer in accordance with the order of the Court if said money is held in custodia legis or to the persons to whom said money properly belongs if otherwise held. It was in obedience of this statute that the County Clerk of Coos County, Oregon, paid to the Treasurer of said county the sum of money paid to him as County Clerk by the Southern Oregon Company on March 15, 1913.

Subsequently on March 31, 1914, the Southern Oregon Company had to its credit in the Flanagan & Bennett Bank the sum of \$3,863.26. On that date the complaint alleges that the plaintiff advanced and furnished to the Southern

Oregon Company to be used by the Southern Oregon Company in complying with the terms of said order of the Circuit Court of Coos County, Oregon, the sum of \$35,000.00, which money was deposited by the plaintiff to the credit of the Southern Oregon Company in the Flanagan & Bennett Bank on the 31st day of March, 1914. The Southern Oregon Company in order to comply with the terms of said order of the Circuit Court of Coos County, Oregon, drew its check on Flanagan & Bennett Bank in favor of the Clerk of said Circuit Court for the sum of \$38,863.26 and thereupon in pursuance of the said statute the said Clerk endorsed and delivered said check to the County Treasurer of said County and the said Treasurer endorsed said check and presented the same to the Flanagan & Bennett Bank and said Bank paid the same. The suit brought by the Southern Oregon Company against the County Treasurer of Coos County, Oregon, was afterwards dismissed but no order was made in said suit disposing of the moneys which had been paid in pursuance of the order aforesaid to the Clerk of said Circuit Court.

The Southern Oregon Company is a corporation organized under the laws of

the State of Oregon. The defendants are all, for the purposes of Federal jurisdiction, citizens of the State of Oregon. It is conceded that no final determination has been had in the suit brought by the United States of America against the Southern Oregon Company pending the final determination of which the order provides that the money should be retained by the Clerk of the Circuit Court of Coos County, Oregon.

The demurrer to the amended complaint filed on behalf of the Flanagan & Bennett Bank presents the following grounds: First, that the District Court of the United States for the District of Oregon had no jurisdiction of the subject-matter of the action; second, that it appears from the face of the complaint that the subject-matter of the action is a sum of money deposited by the Treasurer of Coos County, Oregon, in the Flanagan & Bennett Bank and held subject to the order of the Circuit Court of the State of Oregon for Coos County until the final determination of the case of United States of America against the Southern Oregon Company; third, that the complaint does not state facts sufficient to constitute a cause of action and that if

the plaintiff has any remedy such remedy is at equity and not at law.

ARGUMENT

Jurisdiction of the Court.

In so far as the sum of \$24,752.62 is concerned it is alleged by paragraph XI of the complaint that this was money legally standing to the credit of the Southern Oregon Company in the Flanagan & Bennett Bank at the time that the check was drawn upon the same and at the time that said check was paid. It is also admitted that the sum of \$3,863.26 was money belonging to the Southern Oregon Company standing to its credit in the Flanagan & Bennett Bank at the time that the check for \$38,863.26 was drawn and at the time this check was paid (complaint, paragraph XII). In the same paragraph it is alleged that the plaintiff advanced and furnished to the Southern Oregon Company to be used by the Southern Oregon Company, the sum of \$35,000.00 and that said money was deposited to the credit of the Southern Oregon Company in the Flanagan & Bennett Bank. It is further alleged that the purpose for which this money was advanced was that the same should be used by the Southern Oregon Company to comply with the order of the Circuit

Court of Coos County, Oregon. This money was so used and was by reason of the facts as alleged in this paragraph of the complaint the money of the Southern Oregon Company when the same was paid to the Clerk of the State Circuit Court.

The Flanagan & Bennett Bank therefore contends that the two sums of money for which the Southern Oregon Company gave orders or checks upon the defendant Bank in favor of the Clerk of the Circuit Court of Coos County, Oregon, could have been legally paid by this Bank only upon orders of the Southern Oregon Company. The first question therefore presented is: How could the legal title and the right to this money pass from the Southern Oregon Company to the plaintiff? It is alleged in the complaint, (paragraph XIV) that the Southern Oregon Company assigned to the plaintiff whatever interest it might be said to have in and to said sums of money or any of them and that after such assignment the plaintiff notified the defendant Bank of said assignment and demanded of the Bank the payment of all of said moneys. It is alleged that the money was the money of the Southern Oregon Company at the time the checks were drawn; that the

money was in the defendant Bank to the credit of the Southern Oregon Company and that it was paid in pursuance of the checks and of the law above cited to the party presenting such checks for payment long prior to the date on which the assignment was made to the plaintiff and long prior to the date when demand was made by the plaintiff on the defendant Bank for the same. This is shown moreover by the fact that the complaint alleges that the money was paid by the Southern Oregon Company in pursuance of the order recited on pages 4 and 5 of the brief of the plaintiff in error and this order provides that the money shall be paid by and that it was due from the Southern Oregon Company as taxes upon the lands assessed to the Southern Oregon Company. In other words the transaction shows that part of the money belonged to the Southern Oregon Company originally and that the remainder thereof was loaned to the Southern Oregon Company by the plaintiff and by virtue of such loan became the money of the Southern Oregon Company. An assignment therefore from the Southern Oregon Company to the plaintiff of this sum or these sums of money was necessary before any ownership of the

money could be said to vest in the plaintiff. Prior to that time the relation of debtor and creditor between the Southern Oregon Company and the plaintiff may have existed but the ownership of the money was in the Southern Oregon Company. This claim therefore was a chose in action and it was necessary for this assignment to be made before the plaintiff had a right to bring suit or to receive the money. Furthermore it is alleged in the complaint that the object of the suit brought by the Southern Oregon Company against the sheriff of Coos County was to obtain an injunction and that this injunction was granted upon certain conditions. It is said in the brief of the plaintiff in error (page 25) that the order of July, 1912, did not order the Southern Oregon Company to do anything but that it did order the sheriff of Coos County to do certain things. This is a narrow construction to put upon the order. It is true that the order did require the sheriff to do certain things and to refrain from doing certain things but it also required that the sheriff should only do these things and refrain from doing these things upon payment to the Clerk of the Court by the plaintiff of the sum of money which was actually paid

by the Southern Oregon Company in pursuance of the order. The Southern Oregon Company therefore when it accepted the benefit of the order did so upon the condition that it pay the money and it goes without saying that the injunction would not have been issued had not the plaintiff paid the amount as required by the order. The order of injunction was not conditioned upon the deposit of the tax receipts by the sheriff but it was conditioned upon the payment of the money by the Southern Oregon Company. The claim therefore that the tender of the money was never accepted is refuted by the fact that the money was paid to the proper person or officer and that the Southern Oregon Company availed itself of the benefit of the order.

Section 24 of the Judiciary Act of March 3, 1911 provides that no District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such Court to recover upon said note or other chose in action if no assignment had been made.

In *Sere et al v. Pitot et al*, Chief Justice Marshall held that the suit was one for cash bills and notes by persons to

whom the law transfers them and that the plaintiffs were assignees of a chose in action. That the term "other chose in action" is broad enough to comprehend not only assignable paper being the chose in action most usually transferred but open accounts of a merchant and like claims. This case, the leading one on this subject, has been followed without question by the Federal Courts and the decisions of these courts are gathered in

Kolze v. Hoadley, 200 U. S. 76. The only apparent departure from this rule by the Supreme Court of the United States is found in *Holmes v. Goldsmith*, 147 U. S. 150. In this case the general rule is reaffirmed. The decision was based upon the principle that the plaintiff who appeared to be an indorsee or assignee was in point of fact the payee of the note and that this was clearly shown by the evidence. The suit moreover was between the original parties and the court allowed evidence showing the real relation of the parties upon the principle that it did not change or vary the contract but shows what the contract really was. In this case it is said: "Certainly as against a third party who has become in good faith the holder of a promissory note a defendant, whether a maker or endorser, will not be permitted to escape

from the legal import of his formal contract by an offer of parol evidence." Here in the case at bar money was paid by the legal owner thereof to the officer in pursuance of an order of the Court, which order was procured by the Southern Oregon Company, the owner of the money and was paid for the benefit of the Southern Oregon Company. This was done before the plaintiff at bar had any claim upon this money. The title of the fund therefore passed legally from the owner. The plaintiff at the time the title passed was not the owner of the money and the title passed with its knowledge and with its consent. It was at most a creditor of the Southern Oregon Company. Prior therefore to the assignment from the Southern Oregon Company to the plaintiff the Southern Oregon Company unquestionably could have received the money from the defendant Bank if it had been entitled to the same but the plaintiff could not have received it without deraigning its title to the same by assignment.

The proposition above discussed seems so conclusive that it is scarcely necessary to present any argument in answer to other points made in the brief of plaintiff in error and these questions are so fully

presented on behalf of other defendants that the defendant Bank thinks it unnecessary to reiterate the arguments contained in the brief filed on behalf of the county and of its officers. That the money was originally paid to the Clerk of the Circuit Court of Coos County, Oregon to be held by said Clerk as Clerk of said Court is conceded. When paid therefore it was unquestionably in custodia legis. The authorities cited on behalf of the plaintiff in error are simply to the effect that when the purpose for which the money is placed in custodia legis has been accomplished, then the money may be said to be no longer in custodia legis and that the same may be recovered by the rightful owner thereof from the person in whose custody the same may be found; but the order of court provides that the money shall be kept by the Clerk of the Court, in other words shall remain in custodia legis until the final determination of that certain suit in which the United States of America is complainant and the Southern Oregon Company is defendant. The complaint does not show that this suit has ever been finally determined. The conditions therefore under which the money should be held remain. It was paid for

this purpose; it was paid to be held until the happening of a certain event. This event has not yet transpired. It therefore remains in the same condition in which it was when received. It was voluntarily paid for this particular purpose. It was accepted for this purpose and therefore no one can recover this money or has a right to this money until that event transpires, until the happening of which the money is to be so held.

This cause presents a singularly striking illustration of the wisdom of those who framed the Federal Judiciary Act. One, if not the greatest object sought by this Act was to prevent conflicts between the courts of the state and the courts of the central government. The Federal Courts have as jealously guarded the rights of the state courts as they have their own. If this action can be maintained the defendant Bank receiving this money in good faith from the person who it conceded was entitled to the same may be called upon to pay this sum of money not only upon the judgment of this court but also upon the judgment of the state court. If upon the final determination of the suit brought by the United States of America against the Southern Oregon Company the real estate assessed to the

Southern Oregon Company as owner, situated in Coos County, Oregon, and described in the bill of complaint in said suit, shall be held not to be the property of the United States then the said money under the order of the Circuit Court of Coos County, Oregon, should be paid over by the said Circuit Court to the sheriff and tax collector of Coos County, Oregon, unless it shall meanwhile be otherwise ordered by the said Circuit Court. The remedy therefore of the plaintiff in this case is to apply to the Circuit Court of Coos County, Oregon, for an order modifying the order under which the money was paid and requiring the money to be paid to the plaintiff. This it seemingly has not found fit to do but surely the innocent defendant Bank should not be put in the position of being liable to pay this large sum of money upon the order of the Circuit Court of Coos County, Oregon, and also held liable to pay the same to the plaintiff in this action.

Respectfully submitted,

TEAL, MINOR & WINFREE,
Attorneys for Flanagan & Bennett Bank.